(5)

No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC. IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, *amicus*, The American Advertising Federation ("AAF"), hereby moves for leave to file the accompanying brief *amicus curiae*. Petitioner has granted but respondent has refused consent for AAF to file a brief *amicus curiae* in this case.

The American Advertising Federation is a national trade association that comprises all elements of the advertising industry. Its membership includes 190 companies with numerous subsidiaries that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, radio and television networks, outdoor advertising organizations, and other media.

The membership of AAF consists of individuals and companies possessing an expertise in commercial com-

munication. Each has a direct and continuing interest in maintaining channels of speech unimpeded by governmental abridgments which would affect the right of producers of goods and services to provide, and the public to receive, information regarding those goods and services. AAF contends that the blanket prohibition imposed by the Illinois Supreme Court on a lawyer's truthful representation that he is a certified specialist violates the First Amendment standards established by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and other cases including, most recently, *Board of Trustees of the State University of New York* v. *Fox*, 57 U.S.L.W. 5015 (1989).

In the past, AAF has filed briefs *amicus curiae* in a number of cases before this Court. These cases include *Board of Trustees of the State University of New York* v. *Fox*, *ibid.*; *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

Because of its special expertise in commercial communication and the direct and substantial interest of its members in the resolution of the case at bar, AAF requests leave to brief this issue as *amicus curiae*.

Respectfully submitted,

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August 31, 1989

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BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC. IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

The American Advertising Federation, Inc. ("AAF") is a national trade association that comprises all elements of the advertising industry. Its membership includes 190 companies with numerous subsidiaries that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, radio and television networks, outdoor advertising organizations, and other media. Twenty-one national

trade associations and 226 local advertising clubs/federations with 39,700 members engaged in advertising pursuits also are members of AAF. One hundred sixty-five college chapters, composed of 5,000 students, are members of AAF.

The membership of AAF consists of individuals and companies possessing an expertise in commercial communication. Each has a direct and continuing interest in maintaining channels of speech unimpeded by governmental abridgments which would affect the right of producers of goods and services to provide—and the public to receive—information regarding those goods and services. AAF contends that the blanket prohibition imposed by the Illinois Supreme Court on a lawyer's truthful representation that he is a certified specialist violates the First Amendment standards established by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and other cases including, most recently, *Board of Trustees of the State University of New York* v. *Fox*, 57 U.S.L.W. 5015 (1989).

SUMMARY OF ARGUMENT

The Illinois Supreme Court's decision in this case rests on two erroneous premises which cannot be permitted to stand. The first is that the notation on petitioner's letterhead can be regulated as "commercial speech." The second is that "commercial speech" is a suspect form of expression that, for all practical purposes, falls outside the protection of the First Amendment, subject to censorship at the government's discretion. If either of the lower court's premises is in error—and *amicus* suggests respectfully that both are—its judgment must be reversed. Even if the speech in issue were commercial speech, it still would be entitled to "substantial" First Amendment protection, *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983), which was not afforded by the Illinois Supreme Court here.

ARGUMENT

I. STATEMENTS ON AN ATTORNEY'S LETTERHEAD CANNOT BE REGULATED AS "COMMERCIAL SPEECH"

The category of "commercial speech," as this Court often has noted, does not encompass all messages about business or professional activity. Speech receives the diminished constitutional protection afforded "commercial speech" only when, in the final analysis, it does "no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). As the Court stated just last Term in *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5016 (1989), whether the expression in question proposes a commercial transaction is "the test for identifying commercial speech." See also *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 771 (1976); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Dun & Bradstreet, Inc.* v. *Greenmoss Bldrs., Inc.*, 472 U.S. 749, 790 (1985) (Brennan, J., dissenting).

Nothing in the factual record, and nothing of which the lower court could have taken judicial notice, permitted its implicit equation of this attorney's letterhead with the kind of advertisements or solicitations that have been at issue in the Court's lawyer-advertising cases. Compare *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (newspaper advertisement of clinic's services and fees); *Ohralik*, *supra* (attorney's in-person solicitation of accident victims to obtain their business); *In re R.M.J.*, 455 U.S. 191 (1982) (published advertisements listing attorney's areas of practice and bar admissions; mailings of announcement cards to potential clients); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (newspaper advertisements soliciting clients with Dalkon Shield problems); *Shapero* v. *Kentucky Bar Ass'n*, 100 L.Ed.2d 475 (1988) (personalized mailings seeking the business of non-clients known to be facing foreclosure).

Petitioner used his letterhead in the general conduct of his law business (essentially corresponding with other attorneys and with existing clients), not ordinarily to solicit legal business. There was no evidence or finding here that the reference to petitioner's certification by the National Board of Trial Advocacy was intended to attract new clients. Petitioner's primary purpose and effect may have been to inform other lawyers (including adversaries) of his trial work—so many lawyers never see the inside of a courtroom—or simply to express pride in his recognition by a respected legal organization. The letterhead's meaningful, pertinent, and substantive description of petitioner's type of law practice is "categorically different from the mere solicitation of patronage implicit in a trade name." *Friedman* v. *Rogers*, 440 U.S. 1, 11, n. 10 (1979).

In the absence of evidence that the letterhead was directly used to propose commercial transactions, its promotional quality was far too subtle, oblique, and incidental to constitute an example of regulable commercial speech. It is common today for a law firm's letterhead to note additional jurisdictions in which its attorneys are admitted to practice, and to list the firm's multiple addresses. Like the letterhead statement here, such comments are simply factually informative, however attractive a portrait they may paint. The mere chance that speech will indirectly motivate a putative consumer to purchase the speaker's services cannot operate to deny the speech its full First Amendment protection. If it did, virtually all speech by business enterprises and their agents would be relegated to an inferior status under the Constitution. Rejecting this proposition in *Fox*, the Court noted that "[s]ome of our most valued forms of fully protected speech are uttered for a profit," and that speech is "commercial" only if it "*proposes* a commercial transaction." 57 U.S.L.W. at 5019 (emphasis in original).

Whatever medium a speaker uses to communicate his message—broadcast, print, mail, telephone—his speech is "commercial" only if it proposes a business transaction with the communication's recipient. Mere linkage of a product to a public debate does not transform the advertisement into something other than commercial speech. *Fox*, 57 U.S.L.W. at 5017; *Bolger* v. *Youngs Drug Product Corp.*, 463 U.S. 60 (1983); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563, n. 5 (1980). Conversely, the possibility that direct comments on issues of public importance, or other messages that do not directly propose a commercial transaction, nevertheless may generate business for the speaker does not diminish that speech's First Amendment protection.

II. EVEN AS COMMERCIAL SPEECH, A BAN ON THE STATEMENTS IN PETITIONER'S LETTERHEAD WOULD VIOLATE THE FIRST AMENDMENT

If the reference in petitioner's letterhead to his certification did constitute commercial speech, the Illinois Supreme Court's approval of a complete ban on that speech still would be impermissible. The lower court's decision rests on nothing more than a hunch that readers might misconstrue petitioner's undeniably accurate message. No decision of this Court can, or should, be construed to permit the banning of truthful speech on so flimsy, so entirely speculative, a basis.

It is undisputed that petitioner's claim of certification as a civil trial specialist by the National Board of Trial Advocacy is both accurate and verifiable. As a truthful statement relating to lawful activities, see *In re R.M.J.*, 455 U.S. 191, 203 (1982), petitioner's speech satisfies the first prong of the four-part test set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), and clearly is protected. The lower court's conjecture concerning ways in which unsophisti-

cated readers could misconstrue the message surely cannot be sufficient basis to label it misleading or deceptive and thereby prohibit it entirely. At best, the lower court was *hypothesizing* ways in which the statement could *potentially* be misleading.

The Court provided no support for its view that such a low standard could justify the condemnation of commercial speech. Even if it could, under the remaining prongs of *Central Hudson*, the court could approve only such restrictions as would directly advance, and be narrowly tailored to, the State's professed interests—assuming those interests qualified as "substantial." See *R.M.J.*, 455 U.S. at 203; *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5018 (1989). In the context of this case, the restraint could be "no broader than reasonably necessary to prevent the deception." *R.M.J.*, 455 U.S. at 203.

The Court in *Fox* took pains to note that the requirement of a "reasonable fit" or a "means narrowly tailored to achieve the desired objective," is a meaningful one:

> We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. . . . There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer*, *supra*, at 647, it must affirmatively establish the reasonable fit we require.

57 U.S.L.W. at 5018.

It requires little analysis to demonstrate that the State has failed to craft a restriction that survives this test. It simply has forbidden the speech, not pausing to consider the cost of its actions or whether other means were

available to avoid the perceived harm.[1] One such available remedy, of course, would be for the State to embark upon its own program for certifying attorneys as specialists in particular fields. Another would be for the State to create a reasonable mechanism for approval or disapproval of certification by independent organizations, such as the National Board of Trial Advocacy. See *Ex. Parte Howell*, 487 So. 2d 848, 851 (1986). By promulgating standards for such organizations to follow in order to receive the State's imprimatur, or simply by evaluating the standards established by such organizations, the State readily could ensure both that statements such as petitioner's would not be misleading and that such statements would have greater significance for the consuming public.[2]

The administrative ease of banning the speech outright is of no moment. We are dealing with protected speech, whatever the level of protection. As the Court stated in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985), the government may not suppress "truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." See *Shapero* v. *Kentucky Bar Ass'n*, 100 L.Ed.2d 475, 487 (1988). The banning of

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[1] In both *R.M.J.*, 455 U.S. at 203, and *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985), the Court held that such an absolute prohibition is unconstitutional "if the information also may be presented in a way that is not deceptive."

[2] One possible remedy that would not be narrowly tailored to the State's interests under the facts of this case would be the requirement of a disclaimer, or the presentation of additional information, about NBTA certification. Requiring an attorney to fill his letterhead with state-mandated disclosures would be no less onerous, in practice, than the lower court's requirement that he remove the information altogether. Even in the context of a published adverisement, a required disclaimer or disclosure that unduly interfered with the presentation of the speaker's truthful message would be impermissible. Cf. *Zauderer*, 471 U.S. at 653, n.15.

petitioner's speech thus easily fails the fourth prong of *Central Hudson.*

More important than the lower court's failure to fashion an appropriate remedy is the absence of any objective basis for believing petitioner's speech to be inherently deceptive. Without a demonstrated likelihood of misleading the public (the only governmental interest the State asserts to justify its ban), no restriction on the speech would be permissible. *Amicus* respectfuly submits that the second and third prongs of *Central Hudson* require more, to support restrictions premised on the inherently misleading character of a commercial message, than the ipse dixit that fills the opinion below.

The State offered no evidence below that petitioner's speech had misled anyone; it presented no members of the public to testify about their understanding of petitioner's message; and it submitted no studies, expert testimony, or even anecdotal proof that the speech could mislead in an objectionable fashion. It relied, instead, entirely on its paternalistic and elitist notions of how the recipient of one of petitioner's letterheads would react, presumably believing that such recipient would have no more discrimination and judgment than does the audience for children's television. Cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983) (government may not limit the level of discourse "to that which would be suitable for a sandbox").

The court below thus relied purely on speculations about how persons could *mis*construe what petitioner had said rather than upon any falsity or misrepresentation in what he did say. It speculated that the National Board of Trial Advocacy could be a bogus organization with an unprincipled certification process, rather than upon the record evidence that the organization is respectable and that the profession accepts its certification as meaningful. This analysis hardly can be said to satisfy *Fox*'s requirement, as quoted above, that the government carry

the burden of justifying its restrictions and carefully calculate the cost of its actions.

Surely, even in the area of commercial speech, distaste for the subject matter of one's speech cannot support the censorship of that speech. See *Bolger*, 463 U.S. at 65, 72; cf. *Texas* v. *Johnson*, 105 L.Ed.2d 342, 360 (1989); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55-56 (1988). This Court's lawyer advertising decisions repeatedly have refused to countenance State arguments like those offered here. In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), as here, the State defended its restrictions by labeling as misleading the term "legal clinic"; the reference to "very reasonable" prices; and the failure to indicate that name changes could be accomplished without an attorney. The Court rejected these "unpersuasive" assertions, noting the absence of record facts supporting the State's claim that these aspects of the advertisement would cause problems. *Id.* at 381. As Justice Brennan noted in his separate opinion in *Zauderer*, 471 U.S. at 659:

> Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. [citing *Central Hudson*, 447 U.S. at 569.] Where a regulation is addressed to allegedly deceptive advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," [quoting from *R.M.J.*], and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations.

Merely envisioning ways in which a truthful message could be misunderstood is not enough. "Deconstruction"

is not the standard for putting speech beyond the pale of the First Amendment.

Nothing in petitioner's message was factually, or inherently, deceptive or misleading. There certainly is no evidence to support the State's contention that readers would assume "certification" to be a State function. For example, going outside the factual record, as did the lower court, we would note that most members of the public know that checks are "certified" by banks, not governments. Most people likewise know that rabbis, rather than the Food and Drug Administration or other government instrumentalities, are responsible for certifying that foods are kosher and pareve. Movie ratings and the Good Housekeeping Seal of Approval are among the many other non-governmental attestations upon which people may choose to rely. It is not presumed that the public considers banks, or the Board of Rabbis, or the movie raters, or Good Housekeeping magazine, or the Girl Scouts who sell their boxes of cookies, to be government agencies by reason of their "certifications."

In the final analysis, the decision below rests on the State's belief that the public will be better served by ignorance than by information where attorneys are involved. This premise is faulty in several respects. As the Court observed at the outset of its modern commercial speech jurisprudence, in *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 770 (1976): "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770. See also *Linmark Assoc., Inc.* v. *Willingboro*, 431 U.S. 85, 96-97 (1977); *Bolger*, 463 U.S. at 79 (Rehnquist, J., concurring in the judgment).

Nor, with all respect, can a principled basis be discerned for according lawyers different treatment from other speakers. The high professional standards of attorneys, and their importance to society, are not fundamentally different from the standards and importance of other profession and occupations. To define the professional's standards in terms of his advertising misses the point. As *Virginia Pharmacy Board* notes, there is no correlation between advertising and professional misconduct; while such misconduct can and should be severely penalized, that can be done without denying the public the benefit of truthful information that generates more informed decisionmaking.

Adopting *Virginia Pharmacy Board*'s reasoning for attorney advertising in *Bates*, 433 U.S. at 375, the Court deemed it "peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the information needed to reach an informed decision. . . . Moreover, the argument assumes that the public is not sophisticated enough to realize the limitation of advertising . . . . If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." The Court also stated:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.

Id. at 379.

The decision below reflects none of these sentiments. As a consequence, public ignorance is fostered in order to protect the public from the presumed deviousness of the same attorneys whose lofty ethics support the State's right to regulate in the first place. The ruling below is particularly unfortunate coming, as it does, in an era of increasing specialization by attorneys. As the Supreme Court of Alabama noted in *Ex Parte Howell*, 487 So. 2d at 851:

> It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

No attorney advertises the areas in which he "concentrates" or "limits his practice"—representations the lower court appeared to condone, 126 Ill.2d 397, 534 N.E.2d 980, 985-86 (1989)—to suggest that he is poorly qualified to handle matters in those areas. Surely a lay person would surmise that an attorney who "concentrates" in person injury cases is better qualified to handle his automobile accident suit than an attorney who "limits his practice" to real estate. Where, then, lies the "substantial" governmental interest in permitting such circular representations of specialization while viewing direct statements to that effect as misleading? If the public is as easily misled or as ignorant as the State is forced to contend, it may well believe that attorneys advertise their concentrations in particular areas because they have been uniquely licensed to handle such matters.

The approved advertisements of "concentration," in other words, are as corrosive to the supposed interests being protected—if the public is as ignorant as the State postulates—as the disapproved statement of petitioner's certification. The divergent treatment accorded the two messages makes it still more difficult to see how the regulation here relates to a "substantial" government interest within the meaning of *Central Hudson's* second prong, or "directly advances" such an interest as required by the

third prong. Government restrictions on commercial speech cannot be permitted whenever the creative censor can imagine ways in which consumers might misunderstand simple, truthful statements. Otherwise all lawyer advertising will be subject to prohibition, *Bates* and its progeny notwithstanding, and the protections the Court has afforded other examples of commercial speech also will be for naught.

Perhaps nothing is more difficult to the person who needs legal advice than finding an attorney who practices in the area of his need. With a degree of specialization in the profession that makes many lawyers unqualified to handle all but a few types of legal problems, the public needs information, regardless of its imperfections, that will help it select qualified champions. If the bar itself is unwilling to certify attorneys in specialties, it surely should not be heard to complain that attorneys are turning to other, reputable sources to recognize their areas of expertise, or that they are announcing the results of those organizations' determinations in the restrained, wholly accurate, and professional terms used on petitioner's letterhead.

CONCLUSION

For these reasons, *amicus* respectfully submits that the judgment should be reversed.

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